

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Amendment of Part 1 of the Commission's Rules)
-- Competitive Bidding Proceeding)

WT Docket No. 97-82

TO: The Commission

REPLY COMMENTS OF ISTA

Interactive Video Data Trade Association, Inc., operating under the trade name "ISTA",¹ by its attorneys, hereby tenders its Reply Comments in the above-referenced proceeding. In *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, WT Docket No. 97-82, Notice of Proposed Rule Making, FCC 97-60, released February 28, 1997 ("NPRM"),² the Commission proposed numerous, significant changes to its auction rules. In these Reply Comments, ISTA agrees with those commenters who advocate that the Commission not immediately apply the new rules but rather phase in the new rules over time. In addition, ISTA concurs with those commenters who support Commission retention of the current rules regarding installment payments and grace periods.

I. Prospective Application of the Amended Rules.

To the extent that the Commission adopts amended auction rules in this proceeding, ISTA believes that it would be inequitable at this late stage of licensing to immediately alter the rules applicable to IVDS auctions.³ ISTA agrees with the Personal Communications

1. ISTA is a trade association representing Interactive Video Data Service ("IVDS") equipment manufacturers and approximately 40 IVDS licensees, representing approximately 110 million pops., that obtained their licenses through the Commission's auction process.

2. The NPRM stated a reply date of April 16, 1997, pursuant to which, these comments are timely filed.

3. This section refers primarily to rules ISTA discusses in these Reply Comments. ISTA does not oppose immediate application of the proposed rules that will not likely have an impact on near-future bidders' business plans, particularly (i) those that provide more information or clarified bases for determining eligibility to participate in auctions or for designated entity status, and (ii) those that enhance the integrity of the auction process itself, such as rules relating to ownership disclosure, collusion and other aspects of the auction application and bidding functions.

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Industry Association ("PCIA") that all new rules adopted in this proceeding should apply only prospectively. PCIA correctly identifies that "potential bidders who have built their business cases on existing . . . rules should not now be forced to change their plans" midstream to adhere to new rules adopted in this proceeding. PCIA Comments at 2.⁴ As noted by Airadigm Communications, Inc., et al ("Airadigm"), gradually phasing in the rules ultimately adopted in this proceeding will ensure that no unfair competition within a service transpires and to promote equality within a service's offerings and coverage. Airadigm Comments at 2.

The above rationale speaks with particular force as to the designated entities among ISTA's membership. Given their relative fiscal stature and the interrelated technical and economic obstacles already facing IVDS licensees,⁵ their business planning efforts are already sufficiently fraught with peril. Necessitating the rearrangement of those plans to conform with new rules adopted in this proceeding would be backbreaking. ISTA supports the NPRM's alternative proposal to phase in the new rules prospectively and at a future date.⁶

4. *Accord*, Comments of Nextel Communications, Inc. at 2 ("Potential bidders have reviewed the[existing] rules and begun to prepare auction strategies based upon them. Although the auction has yet to commence, it should begin shortly, and any changes in the auction rules at this late date could only slow the start of the auction and create confusion among potential bidders who have familiarized themselves with existing rules.").

5. For example, the Commission's five-second duty cycle restriction has scared many investors away from IVDS. The equipment necessary to overcome the five-second duty cycle has proved exorbitantly expensive, has failed to work, and in some cases has ceased to be available. Simply put, IVDS, at least from the perspective of potential investors, poses serious concerns as to its current viability as a spectrum-based service.

Similarly, IVDS licensees have unsuccessfully attempted to negotiate with the Commission to extend the IVDS license term to the ten year term similar to that accorded PCS licenses. The abbreviated license term afforded IVDS hampers the ability of IVDS licensees to both fulfill their installment payment deadlines and to secure the capital necessary for buildout. This is particularly true given the already-mentioned technical difficulties facing IVDS as a service.

6. Some Commenters favor earlier application of the amended rules to foster uniformity and/or clarity. As to the latter, there will inevitably be an adjustment period to the new rules that will be attended by some confusion as to their application, regardless of their first date of operation. As to the former, uniformity at the expense of functionality makes little sense in any context, and is particularly inappropriate given the complexity of the Commission's auction rules and the business planning that must precede FCC auctions.

II. Upfront Payments, Down Payments and Installment Payments.

ISTA believes that several of the Commission's proposed rules in this proceeding ignore many aspects of the issues uniquely facing IVDS licensees. The Commission originally designed its IVDS rules based upon, *inter alia*, the needs of designated entities, i.e., minorities, women and small businesses, to enable such entities to provide spectrum-based services. When the Commission auctioned the licenses held by ISTA's members -- designated entities and other auction participants alike -- the Commission touted IVDS as a low-cost "access ramp to the information superhighway." The regulatory, financial and technical landscape facing IVDS licensees, however, has made initiation of service, and making the attendant installment payments on the licensees, increasingly burdensome. *See supra*, note 5. Several of the rules proposed in the instant proceeding would only add to this burden.

Refund of upfront payments. ISTA believes that the practice of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction should be continued so as to allow the business person the opportunity to reinvest in another business venture as soon as possible. AT&T correctly notes in its Comments that discontinuing the practice would impose unnecessary hardship on bidders and might deter participation in future auctions. As Airadigm cogently points out, the burden of pursuing any other course would fall disproportionately upon small businesses. Airadigm Comments at 12. Given the weight already resting on IVDS licensees' shoulders to bring that service to fruition, no further disincentive to invest in the industry should be countenanced. *See* Comments of the Coalition of Institutional Investors ("CII") at 15-16 (noting the probable effects on institutional financiers of the failure to promptly return upfront payments).

Down payments. ISTA believes that AT&T's Wireless Inc.'s ("AT&T"), stance that "[i]n no circumstance should a bidder be required to make a second downpayment . . . if a

petition to deny has been filed against it," AT&T Comments at 4, is untenable. Rather, ISTA agrees with the better position taken on this issue by AirTouch Paging and PowerPage, Inc. ("APPI"). APPI Comments at 9; *accord* PCIA Comments at 5. The FCC should require all designated entities that win licenses to make their second down payments at the same time. Winning bidders who have petitions to deny pending against them should submit their second down payments to the Commission to be deposited into an escrow account. If the petitions to deny are granted, the bidder would be refunded the amount of the second down payment subject to any default payments owed the Commission. If the petitions to deny are dismissed or denied, the funds would be transferred from the escrow account and applied to the balance owed by the licensee. AT&T's argument that "[p]lacing such an encumbrance on the finances of winning bidders while the Commission resolves the issues raised in the petition would be highly prejudicial *vis-a-vis* licensees in the market who are free to construct their systems, market their services, and begin recouping their investment" is unsupported and illogical and may give such entities an unfair economic advantage by permitting them to earn interest during the pendency of the petition to deny proceeding on the funds that would constitute their second down payment.

Default and installment payments and grace periods. ISTA disagrees with the American Mobile Telecommunications Association, Inc. ("AMTA"), that the Commission should amend its rules to impose late fees on installment payments, AMTA Comments at 13,⁷ and further disagrees with APPI's support for the proposed late fee and automatic

7. ISTA also disagrees with AT&T's notion that a standard five percent late penalty should be imposed for no reason other than administrative ease. ISTA believes that it would be appropriate to modify the installment payment rule, Section 1.2110(e), for future auctions to (i) establish a maximum interest-only period of two years, while retaining the authority to increase this period on a service-specific basis and (ii) set the interest rate for such payment plans as of the date a Public Notice is issued announcing the close of the auction. (However, ISTA specifically disagrees with the Commission's proposal for slightly higher interest rates. ISTA favors rates reflecting the best current prime rate.)

default rules. APPI Comments at 8. Furthermore, ISTA strenuously disagrees with the suggestion of Cook Inlet Region, Inc. ("CIRI"), that late payments should be rejected but only as part of a total rejection of the Commission's overall grace period rules. CIRI Comments at 13. Rather, ISTA agrees with Pocket Communications, Inc. ("PCI"), that the grace periods as they currently exist in the Commission's installment payment rules are an indispensable element of the Commission's stated intent to assist designated entities to enter to the spectrum-based services market.

ISTA therefore thinks the better position is that taken by Airadigm, which recognizes that imposing such late fees "will force licensees to devote precious cash flow to paying a fine, instead of meeting their payment obligations." Airadigm Comments at 14. ISTA, given the fragile economic status of IVDS investment, agrees with Airadigm that these penalty provisions are particularly distressing in that it "eliminates [a licensee's] ability to present the individual financial circumstances that merit revision of its payment deadlines." *Id.* at 15. Given all the challenges facing IVDS licensees, the ability to make such a case to the Commission is essential.

If the Commission insists upon imposing a late fee, ISTA finds Airadigm's proposed compromise on this issue not unacceptable. Airadigm proposes that:

The Commission should adopt a system whereby a licensee who cannot make an installment payment is afforded a 90-day grace period without a penalty. After these 90 days, the licensee may take another 90-day grace period subject to a five percent late fee. If a further grace period is needed, the licensee would be required to file a statement demonstrating financial distress as provided under the rules. Should the further grace period be denied, the licensee would have 10 days to pay its overdue balance[.]

Airadigm Comments at 15-16. This last provision is most critical, and ISTA thinks that, no matter what late payment and/or grace period provisions the Commission adopts, in the event of any denial of a grace period, waiver, or any other licensee request which seeks an exten-

sion of the deadline by which it must render a payment, the Commission should explicitly state in this proceeding that (i) until the Commission renders a decision on the request, the licensee is not in default, and (ii) the licensee would have the 10 days specified above to render payment of the outstanding balance due before the license cancels. *Accord*, CII Comments at 16 (although ISTA does not concur with the CII's support for imposition of late fees). The certainty of the Commission providing a clear statement as to this policy will greatly aid IVDS and other licensees, by providing the apparent certainty necessary to attracting and maintaining capital.

Late fees equal to five percent of the amount of the past due payment are excessive and unduly punitive considering the high risk involved in developing a highly speculative business such as IVDS by groups of minorities, women and small businesses. Charging such excessive rates will only discourage future outside investment in IVDS licensees and force many current IVDS licensees into default. As a result of this increased potential for default among designated-entity IVDS licensees, only large companies will be able to afford the licenses necessary to offer spectrum-based services -- the exact opposite of the Commission's previously stated goal.

Just as ISTA believes that a five percent fee should not apply to late installment payments, ISTA believes that neither that five percent fee, nor a ten percent fee should be loaded into the Commission's grace period rules as proposed by the NPRM. These penalties are punitive and unproductive in that many investors will shy away from FCC auctions because of their highly speculative and regulatory nature. PCI cogently recognizes this fact. PCI Comments at 9, 10. As noted above, ISTA believes that the five percent late fee is excessive; compounding that effect by imposing a ten percent fee on what are presently "free" grace periods is worse still.

Moreover, a bright-line "180-day default" rule is Draconian. The Commission's proposal to automatically cancel the license of any licensee who did not make full payment of all amounts -- including a total late payment fee of 15 percent -- within 180 days of the payment due date should not be adopted. If applied to small businesses and other designated entities among ISTA's membership, such a provision would have devastating effects.⁸

The purpose underlying the Commission's decision to confer certain auction and payment "advantages" on designated entities is that such entities have in the past faced insurmountable (and sometimes illegal) hardship obtaining the capital necessary to participate in the spectrum-based services market. These problems have not simply disappeared as a result of the auction benefits the Commission has granted. Such entities continue to face difficulty acquiring the capital necessary to participate in the Commission's auction program and to make the payments arising from a successful bid. These difficulties apply with equal, if not greater, force during the payment term and build-out. This is particularly true given the above-described regulatory and technical regime under which IVDS licensees must operate. A hard-and-fast automatic cancellation rule would doom many IVDS licensees.

Likewise, ISTA opposes the cross-default provision proposed by the NPRM and accepted without support, analysis or criticism by some commenters, such as PCIA. While CIRI may be correct that a cross-default provision would help prevent some selective defaults and "cherry-picking," CIRI Comments at 16, that position fails to recognize the many instances where default may not be a matter of choice for the defaulting licensee.⁹ This is

8. ISTA again notes that AT&T's proposal to adopt the proposed late fee provisions, merely in the name of uniformity, is arbitrary and capricious, particularly as applied to IVDS licensees and bidders, who face significant challenges raising capital in light of the technical and economic issue facing their industry.

9. To the extent that CIRI tempers its position by stating, "[t]he Commission could waive the cross-default policy in circumstances in which the public interest would be served, but bidders should not expect that
(continued...)

particularly true of licensees that diligently strive toward build-out by attempting to resolve equipment and regulatory burdens that inhibit initiating service to the public but who default nonetheless due to unforeseen circumstances that restrict access to capital. ISTA therefore agrees with PCI that the cross-default provision would ultimately not serve the public interest and that its impact would fall disproportionately upon small businesses and other designated entities. PCI Comments at 11-12.¹⁰ ISTA believes that Airadigm correctly points out, in opposing the provision, that "there is no need for a further deterrent when a licensee will lose the entire investment in its license upon default." Airadigm Comments at 16.

The cross-default provision would unduly burden minorities, women and small businesses -- as well as IVDS licensees generally -- who are new to the spectrum-based services market and who are engaged in a facet thereof which has no equipment, no real-world applications, and no foreseeable market use. Given the present risk involved with IVDS as a service, a one-strike-and-out clause is far too severe. IVDS has global issues that must be addressed separately. As to IVDS licensees, particularly those that are designated entities, it is premature to bundle all of an entities' businesses, licenses, lease or fee arrangements, or license payments into an inseparable whole. A failure in one business venture should not be exacerbated by becoming a failure in all similar ventures as well.¹¹

9. (...continued)
default exists as a strategic bidding mechanism[,]” CIRI Comments at 16, ISTA concurs that, if the Commission insists upon adopting the cross-default rule, it should also adopt a liberal waiver policy. ISTA vigorously opposes APPI’s stance that licensee business plans that include more than one type of communications service should be scuttled in their entirety simply because one aspect thereof, as to one particular market or service, fails to proceed exactly according to plan. APPI Comments at 10.

10. ISTA does not disagree with PCI that the Commission should retain authority to impose cross-defaults, as necessary to punish or deter malfeasance, on a case-by-case basis.

11. ISTA does support, however, imposing the default payment penalty specified by Section 1.2104(g) on all defaulting licensees. Such action would serve to discourage defaults and encourage licensees to find private market solutions for default situations.

The proposed cross-default rule would punish businesses for failure in one service despite success in another, when the better approach is treating each purchase of spectrum as an individual business. ISTA believes a better alternative for default is that the defaulting entity must endure a "cooling off" period as to FCC auctions such that it may not participate in Commission auctions for a specified period, perhaps three years. This alternative, rather than the loss of all licenses acquired by auction, is a more equitable solution and more reflective of the problem the Commission seeks to solve in proposing a cross-default rule.

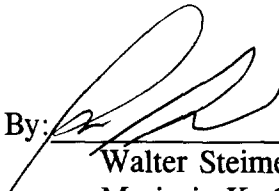
ISTA recognizes that its position taken above on payment and default issues, to the extent that successful bidders in the IVDS services have a not-insignificant incidence of default, runs somewhat counter to the Commission's stated global objectives in this proceeding. However, as to IVDS licensees, the problem has not been that the Commission's payment and grace period rules are overly liberal or are susceptible to abuse. Quite the contrary. The problems facing the IVDS service which may lead to default are those regulatory and economic policies and principles set forth above which detrimentally affect the IVDS service generally. The flexibility present in the Commission's current rules is therefore an absolute necessity for IVDS licensees attempting to nurture that service into one that can quickly, efficiently and profitably initiate service to the public. The present payment, grace period, and default rules, whether generally applicable or specifically applicable to IVDS, should not change at this time and should be further clarified as indicated to provide certainty as to how they will be applied.

Conclusion

Given the fragile state of potential participation of both current and future IVDS licensees in the spectrum-based services market, particularly as to small businesses and other designated entities, the Commission should apply the rules ultimately adopted in the instant proceeding only once putative IVDS bidders and licensees have had a chance to amend their business plans to reflect the new rules. To the extent the Commission has proposed to amend its installment payment and grace period rules, the Commission should not throw out the baby with the bath water. The installment payment plan and its current flexibility of application are essential to a venture as technically and economically risky as participation in the IVDS service. The Commission should retain the installment payment and grace period rules in their present form and consider in a separate proceeding the regulatory changes necessary to IVDS licensees' successful participation in the spectrum-based services market.

Respectfully submitted,

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April 16, 1997

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